Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

CASSIUS McDONALD, PETITIONER,

VS.

ROBERT H. HUDSPETH, WARDEN UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion of the court below has not yet been officially reported. It appears at pages.....to.....of the record. An application for rehearing was denied without opinion (R. ____).

II.

JURISDICTION.

1.

The Sixth Amendment to the Constitution of the United States, among other things, provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, * * * and to have the assistance of counsel for his defense."

2.

Petitioner was discharged on a Writ of Habeas Corpus, issued by the United States District Court for the District of Kansas on June 6, 1940. Appeal was taken by the Government to the United States Circuit Court of Appeals for the Tenth Circuit, and on June 12, 1941, that court duly filed its opinion wherein it reversed the trial court and ordered the return of the prisoner to the Warden at the United States Penitentiary at Leavenworth, Kansas. Petition for rehearing was duly filed and by the Circuit Court of Appeals denied without opinion on the 17th day of July, 1941.

3.

The reasons relied upon for the allowance of the writ are that the United States District Court for the District of Minnesota had no jurisdiction to sentence the prisoner, because no proof was offered of any conspiracy in Minnesota as charged in the indictment, and therefore no proof thereof made, and that the Petitioner did not have, and did not waive the right to have, the assistance of counsel, all as provided in the Sixth Amendment to the Constitution of the United States.

A.

Venue of Trial.

It is true, as stated in the opinion of the Tenth Circuit Court of Appeals, that McDonald was *charged* in the indictment with conspiracy in Minnesota and in Illinois. It is true, also, that overt acts were *charged* in Florida and in Cuba—*but not in Minnesota or in Illinois.*

It is true that on the trial of Petitioner in Minnesota the government absolved Petitioner from any connection of any kind with the actual kidnapping. Thus the only proof made or sought to be made against Petitioner was the commission of the overt acts in Florida and Cuba. It is stated in the opinion of the Tenth Circuit Court of Appeals that because *overt acts* were proved in Florida and Cuba (with no proof whatever anywhere in the record of any conspiracy in any manner in Minnesota or Illinois as charged in the indictment) that that perforce proves a conspiracy in Minnesota or Illinois as charged in the indictment. That, we respectfully suggest, is a pure fiction; and, we also respectfully suggest, is not, and should not be, the law. The Tenth Circuit Court of Appeals has completely overlooked the opinion of this Court in the case of *Brown* v. *Elliott, U. S. Marshal,* and *Moore* v. *Elliott, U. S. Marshal,* 32 S. Ct. 812, wherein it was said, *inter alia*:

> "In the case of *Brown* v. *Elliott, United States Marshal,* and *Moore* v. *Elliott, United States Marshal,* 32 S. Ct. 812, a conspiracy was charged against defendants to defraud certain persons of money by staging and executing fixed horse races. Brown and Moore were apprehended in California; and, upon petition for writ of habeas corpus, the petition was denied by the lower court, affirmed by the Ninth Circuit Court of Appeals, and affirmed by the United States Supreme Court. The indictments charged that the *place* of conspiracy was unknown but that it was *executed* in Nebraska. The question was whether or

not the venue of the case should be laid in Nebraska. The Supreme Court in affirming the Ninth Circuit said (l. c. 815):

> 'As the place of the overt act may be the place of jurisdiction, it follows that the exact place where the conspiracy was formed need not be alleged. This case illustrates the evil which a contrary ruling would cause. The place where the conspiracy was formed was unknown to the grand jurors (and might be so in many cases), but it was intended to be executed in a number of states of the Union, and yet, under the rigor of the contention of appellants, the conspirators could not be tried in any of them. In other words, not the place of the activities of the conspiracy and where it incurs guilt, but the place of its formation, which no one may know or can find out, is the place of the jurisdiction of its trial. And what compels this? It is answered: The Sixth Amendment of the Constitution of the United States. We have determined otherwise in *Hyde* v. *United States.*
>
> *'The Constitution of the United States is not intended as a facility for crime. It is intended to prevent oppression; and its letter and its spirit are satisfied if, where a criminal purpose is executed, the criminal purpose be punished. It is there that its victims are sought and defrauded. It is there that its perpetrators should be brought to the bar of justice for their acts; not for the mere conception of them, but for the actual execution of them. The venue of his trial is thus made by the criminal himself, not determined by reasons or interests which may be adverse to him and used to his injury'* (emphasis ours)."

The Tenth Circuit Court of Appeals is in error also in saying that

> "While it is necessary to allege and prove an overt act, the overt act does not constitute the offense." *Gonkler* v. *U. S.*, (C. C. A. 3rd) 294 Fed. 274, 276.

The Tenth Circuit Court of Appeals says in its opinion (pp. 6-7):

> "* * * The gist of the offense of a conspiracy is an agreement among the conspirators to commit an offense, attended by an overt act by one or more of the conspirators to effect the object of the conspiracy, *United States* v. *Falcone*, 311 U. S. 205, *and the venue may be laid either where the conspiracy was formed or where any overt act in furtherance thereof was committed. Hyde* v. *United States*, 225 U. S. 374, 32 S. Ct. 793, 56 L. Ed. 1114; *Chew* v. *United States*, 8 Cir., 9 F. 2d 348; *Sloan* v. *United States*, 8 Cir., 31 F. 2d 902; *Yenkicki Ito* v. *United States*, 9 Cir., 64 F. 2d 73, 76; *Shea* v. *United States*, 6 Cir., 236 Fed. 97, 101. The court in whose district the conspiracy was formed has jurisdiction to try the defendants, even if no single overt act was committed within its boundary. *Brown* v. *Elliott*, 225 U. S. 392, 402, 32 S. Ct. 812, 56 L. Ed. 1136; *Hyde* v. *United States, supra*; *Hyde* v. *Shine*, 199 U. S. 62, 76, 25 S. Ct. 750, 60 L. Ed. 90; *Shea* v. *United States, supra*; *United States* v. *Wells*, 2 Cir., 192 Fed. 870" (emphasis ours).

We agree.

The venue may be laid *either* where the conspiracy was formed, or where any overt act in furtherance thereof was committed. If the venue be laid where the conspiracy is *charged* to have taken place, then *proof of conspiracy* must be made to give the court trying the case jurisdiction. If not made, then the jurisdiction fails, because the venue is not proper, no crime having been proved to have been committed in that District. But what happened in this case? The record may be searched in vain for any evidence that this Petitioner was at any time in Minnesota or Illinois, as charged in the indictment, or had any communication in any manner or form with anyone in either state at any time. No presence of Petitioner in Minnesota or Illinois. No communication of any kind or by any means by Petitioner or anyone for him with anyone at any time in Minnesota or Illinois. Hence there could be no con-

spiracy *formed,* as charged, in Minnesota where he was tried. To say there was, merely because an overt act was charged and proved in Florida and Cuba, is a pure fiction. It has no substance in reason or intellectual concept.

What did occur?

The overt acts were proved in Florida and Cuba. What is the venue in such case? *Vide Brown* v. *Elliott, etc., supra.*

If one may be charged with *conspiracy* in Minnesota as in this case, and the trial there show a complete absence of proof of any kind as to *conspiracy* there, and be convicted because an *overt act* was committed in Florida, and then such conviction be sustained because of the fiction that the proof of the overt act is proof of conspiracy, then indeed one may be so charged and tried in any district court in the United States from the Pacific to the Atlantic and from the Gulf to Canada, and this in the face of the positive provision in the Sixth Amendment to the United States Constitution to the contrary. Under these circumstances one may wholly innocently, as it is asserted is true in this case, commit an act otherwise lawful (*i. e.,* changing money) at Point A (Florida), and be charged and tried in a jurisdiction hundreds of miles away, at Point B (Minnesota), of an altogether different crime (*i. e.,* conspiracy), when in fact there is no proof even offered that one did in fact conspire, except the proof that one committed an overt act in a foreign jurisdiction.

If that is the law, then the provision of the Sixth Amendment that one must have a speedy trial in the district wherein the crime shall have been committed no longer obtains. It is a nullity.

Suppose no overt act had been proved. Will this court say that Petitioner could have been convicted of conspiracy? No, of course not. One is not convicted on a charge. The charge must be proved. May proof be made of a conspiracy, which word and crime connotes some sort of consultation or communication, between the alleged conspirators, by *mere* proof that one of those charged

as being a conspirator did an altogether innocent act (*i. e.*, changed money in Florida or Cuba—not the place of trial —which act in itself was not a crime at the time of commission or at any time, unless the money so changed was in fact ransom money, and known to be such by the person committing the act, which was not even attempted to be proved in this case) in a jurisdiction foreign to the place of trial? In all reason that should not be the law. It nullifies the 6th Amendment to the United States Constitution.

It must be remembered that the Government could have tried this Petitioner in Florida, but it chose to try him in Minnesota, the home of the person kidnapped, where the populace was inflamed, and the stage set, with two other persons, both of whom had long criminal records and had in fact participated in the kidnapping. This is not the kind of justice with which we have long been familiar, and is the direct antithesis of what is designed by our Constitution and laws.

B.

Assistance of Counsel.

The Tenth Circuit Court of Appeals has said in its opinion, in referring to the drunkenness of Jennings, counsel for Petitioner (p. 11):

> "The most that can be said for this testimony is that it establishes that appellee's counsel drank throughout the trial and that he was under the influence of intoxicating liquor to a greater or less degree during the whole trial. But what of it? * * *"

Surely an appellate court does not mean to say, so nonchalantly and literally, "But what of it?" with all the implications which that phrase in that connection carries with it. Is it the law that where a prisoner's life and liberty are at stake—a layman, not versed in the law, and wholly unacquainted with pleading and court

room procedure—a drunken lawyer may be permitted, without interference by the court, to represent the layman, and not, as is definitely shown in this case, make a pretense of letting the prisoner's story even be told? Surely not. The Tenth Circuit Court of Appeals says in its opinion (p. 12):

> "There is a vast difference between lacking the effective assistance of competent counsel and being denied the right to have the effective assistance of competent counsel." * * *

We respectfully disagree, if that court means to say the distinction drawn is determinative of the prisoner's right. There is a distinction, but it is a distinction without a difference in so far as the prisoner's rights are concerned. Mere presence of counsel does not satisfy the Sixth Amendment to the Constitution. *Avery* v. *State of Alabama*, 308 U. S. 444, 60 S. Ct. 321.

Suppose a deaf and dumb man were the prisoner. Are his rights not to be protected by the court? Such a prisoner can neither waive nor demand counsel. Is there no duty cast upon the court? Of course, there is. The court cannot sit supinely on the bench and take no action. Why? Because the Constitution says "assistance of counsel." It is the court's duty to see that there is *assistance* of counsel—not merely *presence* of counsel. What does *assistance* of counsel mean? It means *effective assistance. Thomas et al.* v. *District of Columbia*, 90 F. 2d 424 (U. S. C. A. for D. C., 1937); *Powell* v. *Alabama*, 287 U. S. 45, 68-71, 53 S. Ct. 55, 77 L. Ed. 158, 83 A. L. R. 527; *Johnson* v. *Zerbst*, 304 U. S. 458, 58 S. Ct. 1019.

If an appellate court is to be permitted to say, as we believe the Tenth Circuit Court of Appeals has said, but inadvertently, when it said, "But what of it?" that a drunken counsel can meet the requirements of *Johnson* v. *Zerbst, supra*, then we most emphatically, but respectfully, disagree. A counsel, drunk, who does not permit his client to be heard, though he requests it, is, in all

reason, not assisting his client. His client has no "due process of law," which phrase is difficult to define, and perhaps impossible of definition, but which Webster says means "a law which hears before it condemns." *Fleenor* v. *Hammond*, 116 F. 2d 982, 985; *Powell* v. *Alabama*, 287 U. S. 45, 53 S. Ct. 55.

In the case of *Achtien* v. *Wood*, 117 F. 2d 989, 992 (7th Cir., Evans, J.) (Feb., 1941), it was said:

> "It would seem tolerably clear that an accused is entitled, if he desires counsel, not only to be represented by one admitted to the bar, but to be represented by competent counsel—by a capable practitioner."

Is this court to say that a drunken lawyer is a *competent* one? No.

In the recent case of *Avery* v. *State of Alabama*, 308 U. S. 444, 60 S. Ct. 321, Mr. Justice Black, at page 322, stated:

> "But the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment."

So here can it be said that a drunken lawyer could "assist" the Petitioner? It must be remembered that the Petitioner was not permitted to take the stand, by his counsel, in his own defense, and his witnesses were sent away by his counsel and not used. Has a trial court any duty to see to it that counsel perform their services? Of course it has. The mere presence of an attorney for the accused does not satisfy the requirement of the Sixth Amendment. He must competently perform.

This record shows that Petitioner did not waive at any time the right to be represented by counsel. It shows

that on examination of the jury he specifically stated that he had no objection (in the absence of the counsel employed for him) to other defense lawyers examining the jurors for him so long as he did not waive any of his rights in so doing. The record further shows that he asked permission to introduce other counsel, Mr. Bernard of Detroit, Michigan, but that Mr. Bernard did not show up. The record further shows that Jennings, the lawyer employed for him, was drunk, and drank continuously.

Has the court no duty under such circumstances?

The Tenth Circuit Court of Appeals said in *Zahn* v. *Hudspeth*, 102 F. 2d 759, 761:

> "But a defendant may waive the right, provided it is waived intelligently, understandingly, and in a competent manner, and the duty rests upon the trial court to determine whether it is waived in that manner."

Here the Petitioner made no waiver at all. Here his counsel was drunk, and drinking constantly, and Petitioner asked and was granted permission to introduce other counsel, who did not in fact show up. To say that the trial court had no intimation of what was going on is to close one's eyes and mind to perfectly obvious conditions.

The provision of the Sixth Amendment is not satisfied under such circumstances, as pointed out by Mr. Justice Black in *Avery* v. *State of Alabama, supra.*

Respectfully submitted,

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